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# In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 174

THE CITY OF YOUNGSTOWN,
*Petitioner,*

vs.

THE ERIE RAILROAD COMPANY,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit, and
## BRIEF IN SUPPORT OF PETITION.

CHARLES S. BELTER,
730 Jackson Place, N. W.,
Washington, D. C.,
JOHN A. WILLO, *Law Director,*
I. FREEMAN, *Ass't Law Director,*
City Hall, Youngstown, Ohio,
*Attorneys for Petitioner.*

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# In the Supreme Court of the United States

**OCTOBER TERM, 1943.**

## No. .....

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vs.

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*Respondent.*

**PETITION FOR WRIT OF CERTIORARI**
**To the United States Circuit Court of Appeals**
**For the Sixth Circuit.**

*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

The above-named petitioner, The City of Youngstown, by the undersigned, its attorneys, respectfully prays that writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit entered on April 20, 1943, after denying petition for rehearing. Said judgment affirmed an order of the District Court for the Northern District of Ohio entered on December 31, 1941, which confirmed, over exceptions by this petitioner, the report of the Special Master disallowing in full its claim filed in the reorganization proceedings of said railroad under Sec. 77 of the Bankruptcy Act. The opinion of the Circuit Court of Appeals is reported in 133 Fed. (2) 730.

**STATEMENT AS TO JURISDICTION.**

The opinion of the Circuit Court of Appeals was filed on February 19, 1943, and judgment entered on April 20, 1943 after petition for rehearing was denied. The jurisdic-

tion of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925; Sec. 347 (a), Title 10, U. S. C. A., which provides:

> "In any case, civil or criminal, in a Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

Sec. 350 of Title 28, U. S. C. A., provides:

> "No right of error, appeal or writ of certiorari intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application thereof be duly made within three months after entry of such judgment or decree."

**STATEMENT AND HISTORY OF CASE.**

On September 8, 1922, by decree of the Common Pleas Court of Mahoning County, in Case No. 31,566, entitled "The City of Youngstown, plaintiff, v. Erie Railroad Company, *et al.*, defendants," provisions were made for the abolition of certain railroad crossing in said City and the contributions to that improvement by the railroads (Record, p. 8). Pursuant to that decree the City of Youngstown, in September, 1928, commenced proceedings for the elimination of a railroad crossing at North Watt Street by the erection of an overhead bridge. In carrying out that project the street level of North Watt Street at the approach to the bridge had to be raised, resulting in an elevation of the grade by eleven feet and partial loss of access to a building owned by the Standard Plate Glass Company situated at or near the approach to said bridge, on which

property the Mahoning Savings and Trust Company, now merged with the Mahoning National Bank, at that time held a mortgage in the sum of $36,000.

On December 21, 1928, suit was commenced by the Glass Company against the City, in Case No. 70,896, to recover damages resulting to its property by reason of the grade elimination. A judgment was rendered in that case against the City for the sum of $51,000, comprising $16,000 for damage to land, $31,000 for damage to the building, and $4,000 for loss of business, which judgment the City paid and to which the Erie Railroad Company has contributed 65%. The Bank had knowledge of the transaction and asserted no claim to the compensation fund.

On July 26, 1932, almost four years later, the Bank, holder of the mortgage, commenced an action against the City in Case No. 85,382 to recover damages for the impairment of its mortgage security. The case went through three jury trials. In the first trial the jury returned a verdict of $7,000, which was set aside by the trial judge on motion of plaintiff. In the second trial the jury found for the defendant and a new trial was granted by the trial judge for error in his charge. In the third trial, on October 17, 1943, the trial judge withdrew the case from the jury and directed a verdict for the Bank in the sum of $47,000. The case is now pending appeal before the State Court of Appeals.

On December 10, 1934, the Bank filed its action for foreclosure of the mortgage, in Case No. 92,377, and on January 19, 1939, by leave of court, filed an amended petition in the foreclosure action joining the City and the railroads, including the Erie Railroad, as parties defendant. The object of the joinder was a vague compliance with the practice suggested in the case of *Brown v. Toledo*, 130 O. S. 513, as to joinder of causes, but in reality an attempt, by way of incidental relief, to obtain a deficiency judgment against the City and the railroads for any loss the Bank shall have

sustained for impairment of the security resulting from the change of grade. On appeal, the Court of Appeals of Mahoning County dismissed the City and the railroads from the foreclosure action, on the ground that they had no interest in the property sought to be foreclosed, nor were subject to personal judgment in the foreclosure action. The Bank appealed to the state Supreme Court, but its appeal as of right was dismissed and motion to certify overruled.

While these actions were pending in the state courts, the Erie Railroad Company went into reorganization under Section 77 of the Bankruptcy Act, Sec. 205, Title 11, U. S. C., and in accordance with the orders in the reorganization proceedings the City filed its claim against the Railroad for 65% of $36,000, plus 6% interest from March 31, 1931, based on the liability of the railroad, under statute and grade elimination decree, with respect to damages the City may be required to pay to the Mahoning National Bank of Youngstown in its pending action against the City in the Court of Common Pleas of Mahoning County, Ohio, in Case No. 85,382, for impairment of its mortgage security resulting from the change of grade.

The Special Master disallowed the claim on the ground that the Railroad, having contributed 65% of the damages paid to the Standard Plate Glass Company, owner of the property, is liable for no further contribution with respect to any damages the City may be required to pay to the Bank for impairment of its mortgage security. It is the contention of the City that by virtue of the grade elimination decree and Section 8883, G. C., the Railroad's liability for contribution towards any damages the City may be required to pay in this improvement, including damages for impairment of mortgage security in addition to any damages paid to the owner, is absolute, and that the City had a provable contingent claim in this proceeding for reorganization of the railroad; that the reorganization court should either have made provision under the re-

organization plan for a sum sufficient to pay the City's contingent claim in case liability shall have been established in the state court action, or else disallow the claim in this proceeding, because incapable of liquidation or reasonable estimation, without prejudice to the City's right of recovery, as it may otherwise in law or equity be entitled.

The United States District Court for the Northern District of Ohio confirmed the report of the Special Master and entered an order overruling the exceptions of this petitioner and disallowing in full the petitioner's claim. The Circuit Court of Appeals affirmed the judgment of the District Court, on the ground that the City had no claim because of its negligence in paying the damages to the owner instead of to a mortgagee of the property.

## SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals erred:

1. In holding the City negligent in paying the damages to the owner instead of to a mortgagee of the property who consented to the settlement with the owner.

2. In failing to hold the railroad liable to the City by virtue of statute and grade elimination decree.

3. In failing to protect the City's contingent claim as provided by Sections 77 (b) and 57 (d) of the Bankruptcy Act.

4. In refusing to approve the order submitted by the City disallowing its claim without prejudice.

5. In rendering judgment upon a moot question.

6. In affirming the order of the District Court.

## REASONS FOR GRANTING THE WRIT.

1. The decision of the Circuit Court of Appeals adjudicating upon future rights on a moot question is in direct conflict with applicable decisions of the court and

a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision under Rule 38 of the Rules of this Court.

2. The precise question, should the Court deem proper to assume jurisdiction, whether a railroad in a grade elimination project may be required to bear the double damages a municipality may be required to pay in the project to an owner and a mortgagee respectively, has never been before this Court and presents a question of general importance which should be settled by this Court.

3. The Circuit Court of Appeals in considering the petitioner's claim failed to pass upon the question whether the word "damages" contained in Section 8883, G. C. and the grade elimination decree includes double damages a municipality may be required to pay to an owner and a mortgagee of property respectively, and for which the railroad is proportionately liable to the municipality.

**PRAYER.**

WHEREFORE, it is respectfully submitted that the writ of certiorari prayed for should be granted and that the judgment of the United States Circuit Court of Appeals for the Sixth Circuit should be reversed.

CHARLES S. RHYNE,

JOHN A. WILLO,

I. FREEMAN,

*Attorneys for Petitioner.*